

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ELLA COOPER FROEHLICH,

Plaintiff-Appellant,

v

DEITER FROEHLICH and KIMBERLEE  
MCCARDEL,

Defendants-Appellees.

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UNPUBLISHED

March 14, 2006

No. 264616

Grand Traverse Circuit Court

LC No. 04-023834-CZ

Before: Smolenski, P.J., Whitbeck, C.J., and O'Connell, J.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition to defendants. We affirm. This case arose when plaintiff's and defendant Deiter Froehlich's marriage and business relationships faltered and ultimately failed. In her complaint, plaintiff alleged that she and Mr. Froehlich were married and owned a coffee shop together called The Espresso Station, but Mr. Froehlich became involved with defendant McCardel. After separating from plaintiff and filing a divorce action, Mr. Froehlich temporarily reconciled with plaintiff. Ultimately, however, Mr. Froehlich again filed for divorce, left The Espresso Station, and took a job at a coffee shop called Java Jake's, which is owned, in part, by defendant McCardel.

Plaintiff filed this suit, claiming fraud, civil conspiracy, breach of fiduciary duty, intentional infliction of emotional distress (IIED), and slander. Her breach of fiduciary duty claim was founded on the allegation that Mr. Froehlich held a fifty percent interest in The Espresso Station when he helped McCardel establish and run her competing coffee shop. Her other counts stemmed from her allegation that Mr. Froehlich only feigned the attempt at reconciliation to ensure that he could retain his "green card" and obtain reimbursement for McCardel for money she had loaned him to pursue the first divorce. According to plaintiff, Mr. Froehlich persuaded her to repay McCardel and transfer other assets to him by telling her that the loan and his general lack of financial independence threatened the success of their marriage. Plaintiff alleged that Mr. Froehlich never intended to continue the marital relationship, and despite assertions to the contrary, defendants continued their romantic relationship during the supposed reconciliation.

Defendants were served with process on Friday, July 2, 2004. They brought the lawsuit to the attention of Mr. Froehlich's divorce attorney, who agreed to represent them. However, they inadvertently told him that they had been served on Friday, July 9, 2004, so the attorney

thought their answers were not due until July 30. On July 26, the first business day after defendants' answers were due, plaintiff filed a motion for default and an affidavit asserting defendants' lack of response. Default was entered against defendants, and they immediately filed answers, affirmative defenses, and a motion to set aside the default accompanied by affidavits explaining the inadvertence and suggesting that their attorney could present absolute defenses to plaintiff's cause of action. Plaintiff responded that misreading the summons did not constitute good cause and that defendants' affidavits failed to assert any facts that suggested a meritorious defense. Defendants replied that they are not attorneys, and their meritorious defenses are purely legal because plaintiff's defective complaint essentially claimed alienation of affections, a tort which the legislature abolished. MCL 600.2901. The trial court, who had presided over the Froehlichs' divorce, considered the issue on the record and set the default aside.

Defendants moved for summary disposition of all the claims, arguing that plaintiff had not adequately pleaded fraud; she could not support her claim of intentional infliction of emotional distress; she brought her slander claim after the limitations period had expired; and neither defendant owed her a fiduciary duty because the Froehlichs had agreed that Mr. Froehlich would take the job at Java Jake's. Defendants included Mr. Froehlich's affidavit, which supported the defenses raised. Plaintiff responded with her own affidavit, but it did not state facts that would support all of her claims, it merely reiterated many of her allegations and included a few details regarding defendants' actions during and immediately after the ill-fated reconciliation. The trial court granted defendants summary disposition on the slander, IIED, and the breach of fiduciary duty. The trial court found that plaintiff failed to plead or provide any evidence that she suffered severe distress, and it found that the coffee shops were too far apart to establish plaintiff's bald assertion that they competed. The trial court also dismissed the slander claim as untimely, but allowed plaintiff the opportunity to amend her complaint to plead fraud and the civil conspiracy claim with particularity. After plaintiff filed an amended complaint, defendants again moved for summary disposition, and the trial court granted it for the last two claims. Neither party supplemented the record between the first and second summary disposition motion.

Plaintiff argues that the trial court erred when it set aside the default entered against defendants. We disagree. We review for abuse of discretion a trial court's decision to enter or set aside a default. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 469; 666 NW2d 271 (2003). We will not find an abuse of discretion unless the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

Plaintiff argues that defendants' affidavits did not set forth facts that would support a meritorious defense, so MCR 2.603(D)(1) precludes the trial court from granting default. According to MCR 2.603(D)(1), a court may only set aside a default if "good cause is shown and an affidavit of facts showing a meritorious defense is filed." Although we agree that the affidavit of meritorious defense is indispensable under the court rule, *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999), three factors combine to make defendants' affidavits sufficient in this case. First, defendants actually filed affidavits, making the issue one of whether their affidavits were sufficient rather than existent. Second, the

affidavits reflected that defendants' attorney would raise absolute defenses, and he raised them in the contemporaneously filed answers, affirmative defenses, and motion to set aside the default. These additional filings argued purely legal defenses on the sole basis of the facially invalid complaint. Third, and most important, the trial court was already familiar with the factual underpinnings of plaintiff's case and defendants' defenses through its experience with the Froehlichs' underlying divorce, the final entry of which was significantly delayed by plaintiff's efforts to preserve the present action. Under these circumstances, the trial court did not abuse its discretion when it found that defendants' affidavits sufficed to support their meritorious and absolute defense, namely that plaintiff's claims were barred by the Legislature's abolition of torts involving the alienation of affections. MCL 600.2901.

Regarding good cause, plaintiff, without contacting opposing counsel, immediately filed for default when the twenty-one days allotted for answering the complaint expired. According to the affidavits, defendants did not have a summons that reflected the date of service, and they inadvertently told their counsel the wrong date of service. Defendants immediately responded upon receiving notice that they were defaulted. Therefore, this case is akin to *Bednarsh v Winshall*, 364 Mich 113; 110 NW2d 729 (1961), in which default was inappropriate because excusable "confusion" was seized upon by opposing counsel with "undue haste." Therefore, the trial court did not abuse its discretion in finding good cause and setting aside the default.

Plaintiff also argues that the trial court erred when it granted defendants' motion for summary disposition on her breach of fiduciary duty and IIED claims. We disagree. We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). With defendants' summary disposition motion, Mr. Froehlich presented an affidavit in which he explained that he and plaintiff agreed that he would work at Java Jake's, and that he did so merely on a part-time basis without having any ownership interest in it. He also asserted that he never signed a non-compete agreement with The Espresso Station or plaintiff, and that he began working at Java Jake's after plaintiff asked him to leave The Espresso Station. He explained that Java Jake's was a local coffee shop in Acme, and that The Espresso Station was located in the Traverse City train depot. At the hearing, defendants argued, without dispute, that Java Jake's was only a local shop, but The Espresso Station was a Starbucks franchise outlet. The trial court correctly determined that plaintiff failed to substantiate her claim that Mr. Froehlich violated his fiduciary duty to The Espresso Station, because plaintiff failed to create a genuine issue of fact whether the two businesses actually competed. MCR 2.116(C)(10).

Regarding plaintiff's claims for IIED, plaintiff failed to present any facts in response to defendants' summary disposition motion that would establish her claim. In her affidavit, she only alluded to vague transactions in which Mr. Froehlich "refused counseling or to reconcile in any way other than to coerce Plaintiff to reimburse . . . McCardel . . . , and to obtain financial advantage from marital assets, and the removal of his conditions to his United States residency." She also alleged that defendant McCardel and Froehlich maintained their relationship, that Mr. Froehlich left her after obtaining assets and clearing up his immigration status, and that McCardel had "contact" with her after the marriage ended. Viewing plaintiff's presentation of the facts in the light most favorable to her, she failed to establish a factual basis for intentional infliction of emotional distress, and the trial court correctly granted summary disposition on this claim as well. *Maiden, supra* at 119-120.

Finally, plaintiff argues that the trial court erred when it granted defendants' motion for summary disposition on her fraud claims. We disagree. The trial court correctly held that plaintiff failed to present any evidence that would create a genuine issue of fact that Mr. Froehlich or McCardel committed a legally compensable fraud. Plaintiff never provided factual support for her claims against McCardel, and her claims against Mr. Froehlich fail as a matter of law.<sup>1</sup> Plaintiff essentially argues that Mr. Froehlich deceived her into reconciling so that he could leverage money from the marital home, obtain a permanent visa, and finagle reimbursement for McCardel. However, this Court will not allow a plaintiff to recover on the basis of a fraud that is perpetrated to initiate a marriage, *Gubin v Lodisev*, 197 Mich App 84, 88-89; 494 NW2d 782 (1992), and plaintiff fails to persuade us that we should allow recovery when the alleged fraud merely perpetuates the marriage. Although the trial court could take Mr. Froehlich's alleged misbehavior into account when fashioning a divorce judgment, an injured ex-spouse may not bring an independent action for fraud when the underlying misrepresentations are so entangled with the breakdown of the marital relationship. *Id.*

Because plaintiff failed to substantiate her other tort claims against defendants, her contingent claims against defendants for civil conspiracy also fail. *Roche v Blair*, 305 Mich 608, 615-616; 9 NW2d 861 (1943).

Affirmed.

/s/ Michael R. Smolenski

/s/ William C. Whitbeck

/s/ Peter D. O'Connell

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<sup>1</sup> Plaintiff's factual support for her claims against Mr. Froehlich is also weak, but ultimately the legal basis for the claim is so deficient that discussion of the factual assertions is irrelevant.